No. 82-1539

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES O. DRUKER and JOAN S. DRUKER

Petitioners

—*against*—

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do the tax rates set forth in 26 U.S.C. § 1 unconstitutionally discriminate against two-earner married couples in that they impose the highest tax burden upon those couples?

2. Should a penalty be imposed upon the petitioners under 26 U.S.C. § 6653(a) where they exercised their right to challenge the provisions of the Internal Revenue Service Code which they believed, in good faith, to be unconstitutional, and where they exercised their challenge in a manner which was calculated to disclose their challenge to the Internal Revenue Service at the earliest possible moment?

3. Did the court below correctly deny petitioners joint filing status for year 1976, where an auditor for the Internal Revenue Service had informed them that they had been accorded joint status, and where, at the time of this representation on the part of the auditor, petitioners could have elected to file for married joint status?

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JAMES O. DRUKER and JOAN S. DRUKER

Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

The petitioners herein seek certiorari to review an order of the United States Court of Appeals for the Second Circuit entered December 22, 1982. That order affirmed in part and reversed in part an order of the United States Tax Court entered February 2, 1982. The tax court order had declared 26 U.S.C. § 1 to be constitutional, had refused to grant to petitioner James O. Druker a home-office deduction for the year 1976, had refused to grant petitioners joint filing status for the year 1976, and had refused to impose a penalty under 26 U.S.C. § 6653(a) for wilful failure to obey the tax laws.

OPINIONS BELOW

The opinion of the Tax Court, rendered after trial, is reported at 77 TC 867 (1981) (Appendix A). The opinion of the Second Circuit is not yet officially reported (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Second Circuit is dated December 22, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein are: United States Constitution Amendments 5, 9 and 10 and 26 U.S.C. § 6013(b) and 6653(a). They are reprinted, verbatim, in the Appendix hereto (Appendix C).

STATEMENT OF THE CASE

Facts

In the years of 1975 and 1976, Petitioners James and Joan Druker (the "Drukers") were legally married and were both employed. By the operation of 26 U.S.C. § 1, the Drukers' income was taxed at a substantially higher rate than it would have been had they obtained a divorce on December 31, 1975. Therefore, the Drukers undertook a challenge to the constitutionality of the tax rate structure. In order to do so, the Drukers, for the two years in question, filed separate tax returns, checking the tax status box labeled "married, filing separately". In computing their tax liability, they used the rates applicable to unmarried individuals.

Prior to the challenge herein, James Druker, who was then an Assistant United States Attorney in the Eastern District of New York, conferred with the United States Attorney and the Chief of the Internal Revenue Service Intelligence Division. He did so to secure their advice as to how to challenge the constitutionality of the tax rate structure without incurring a penalty for fraud or wilful disregard of the regulations. As a result of these conversations, the returns were filed in the manner above described. In addition, attached to each return was a copy of a letter, the original of which was sent to Respondent, Commissioner of Internal Revenue. That letter stated that the Drukers were applying the tax rates applicable to single individuals because they believed that the tax rate structure unconstitutionally discriminated against two-earner working couples. It further stated that they intended to litigate the issue and that, if they were unsuccessful they would pay all taxes due, with interest.

The Drukers received notices of deficiency on April 13, 1979.

In June, 1979, in lieu of filing an amended joint return, James Druker arranged for a supplemental report regarding the Drukers' tax liability in order to recompute the purported deficiencies for the year 1976 based upon a joint filing status. At that audit, the auditor completed a supplemental report recomputing the Drukers' tax liability for 1976 based upon joint filing status. On June 18, 1979, the Drukers sent a letter to the Internal Revenue Service agreeing to the figures but reserving their right to contest the constitutionality of 26 U.S.C. § 1.

Thereafter, on July 5, 1979, the Drukers filed a timely petition with the United States Tax Court. A trial of the matter was held in New York City on January 13, 1981. At trial, the Drukers contested, *inter alia,* the constitutionality of 26 U.S.C. § 1. They further contended that they should be accorded joint filing status for 1976. The respondent Commissioner contended that they

should be liable for penalties in the amount of $294.17 for intentional disregard of the rules and regulations of the Internal Revenue Service.

The Tax Court upheld the constitutionality of 26 U.S.C. § 1, refused to accord the Drukers joint filing status for 1976, and held that they were not liabile for a penalty for intentional disregard of the rules and regulations aforesaid under 26 U.S.C. § 6653(a).

On December 22, 1982, the United States Court of Appeals for the Second Circuit reversed so much of the order of the Tax Court as refused to impose a penalty under 26 U.S.C. § 6653(a), imposed such a penalty and otherwise affirmed the Tax Court's order.

REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD REVIEW THE CONSTITUTIONALITY OF 26 U.S.C. § 1 BECAUSE IT IS A QUESTION OF IMPORTANCE WHICH HAS NOT YET BEEN DECIDED BY THIS COURT AND BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH PRIOR PRECEDENT OF THIS COURT.

The question of the constitutionality of the tax rates in 26 U.S.C. § 1 is one that has yet to be resolved by this court. The effect of these rates, established by Congress in the Tax Reform Act of 1969, is to establish a "marriage penalty" for two-earner married couples which can result in a tax burden of up to $4,000.00 more than their single counterparts. This reversed the prior tax laws which penalized single taxpayers over their married counterparts. Although lower Federal courts have

declared both tax rate structures constitutional, this court has consistently declined to hear the cases. *See, e.g., Mapes vs. United States,* 576 F.2d 896 (Ct. Cl.) *cert. denied* 439 U.S. 1046 (1978); *Johnson vs. United States,* 422 F.Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom Barter vs. United States,* 550 F.2d 1239 (7th Cir. 1977); *Kellum vs. Commissioner,* 58 J.C. 556 (1972) *aff'd per curiam* 474 F.2d 1399 (2d Cir.) *cert. denied* 414 U.S. 831 (1973); *Faraco vs. Commissioner,* 261 F.2d 387 (4th Cir. 1958) *cert. denied* 349 U.S. 925 (1959). Moreover, although Congress has recently reduced the effect of the marriage penalty, it has not eliminated the penalty. Thus, the issue is still one of importance.

In addition, the Second Circuit upheld the constitutionality of 26 U.S.C. § 1 in a manner which conflicts with the prior decisions of this court regarding the constitutionality of statutes interfering with the right to marry. As the Second Circuit acknowledged, in its opinion below, this Court has recently stated, explicitly, that the right to marry is "fundamental". *Zablocki vs. Redhail,* 434 U.S. 374 (1978). In *Zablocki, supra,* this Court struck down a Wisconsin statute which forbade Wisconsin residents who have a minor child not in their custody whom they are liable to support to marry without court permission. Court permission, in turn, was dependent upon the applicant's proof that child support payments were current, and that the non-custodial child would not become a public charge. This court found both the necessity for permission, and the financial requirements for that permission, to be an unconstitutional interference with the right to marry. Similarly, here, the tax rate structure imposes what is, in effect, a yearly fee on a two-earner married couple of up to $4,000.00. This amounts not only to a "marriage penalty," but to a "marriage tax." This, too, is unconstitutional. *Harper vs. Virginia State Board of Elections,* 383 U.S. 663 (1966). Although, as the Second Circuit noted, this tax does not place a "direct obstacle" in the path of those wishing

to get married, it does, as in *Zablocki, supra,* and *Harper, supra,* make wealth (in the form of ability to pay substantially increased taxes) a prerequisite to marriage. Indeed, the record in the present case clearly reflects that the sole reason for Petitioners having become divorced was the heavy financial burden imposed by the "marriage tax." This is clearly unconstitutional. Moreover, it does not matter that Congressional intent was only to provide tax relief for single tax payers because statutes which work even unintended discrimination against fundamental rights are unconstitutional. *Yick Wo vs. Hopkins,* 118 U.S. 356 (1886).

Moreover, the decision of the Second Circuit, as well as that of the Seventh Circuit and the Court of Claims is in conflict with *Hoeper vs. Tax Commission,* 284 U.S. 206 (1931). In that case, this Court invalidated a Wisconsin statute which required spouses to aggregate their separately earned incomes for tax purposes. That case has not been overruled, and clearly applies to, and is indistinguishable from the case at bar. The Seventh Circuit attempted to distinguish *Hoeper* from the question of the constitutionality of 26 U.S.C. § 1, stating that there is not federal requirement that a couple aggregate its income, in that the spouses can file separate returns. *Johnson vs. United States, supra.* However, in commenting upon whether these tax rates actually represent an option to victims of the marriage penalty, the Second Circuit stated:

> "The rates set under § (d) for [married persons filing separate returns] were the pre-1969 rates for single taxpayers. So disadvantageous is this schedule that only about 1% of married couples file separately." *Druker vs. Commissioner,*—F.2d—at—, Slip Op. #108, 115, 116, at p. 820, fn. 1.

Thus, as a practical matter, their is no option for married couples but to aggregate their income. That is the very practice condemned in *Hoeper, supra.* Thus, the distinction made by the

Seventh Circuit is a distinction without a difference.

The Second Circuit failed to even mention *Hoeper* in its decision upholding 26 U.S.C. § 1. Thus, lower court precedent in two circuits is contrary to a decision of this court, and this court should resolve it.

B. THE COURT SHOULD REVIEW THE APPLICABILITY OF THE PENALTY UNDER 26 U.S.C. § 6653(a) TO THIS CASE BECAUSE OF A CONFLICT IN THE CIRCUITS

The Second Circuit, in reversing the trial court and applying the § 6653(a) penalty to this case, acted contrary to a decision of the Fifth Circuit in *Marcello vs. C.I.R.*, 380 F2d 499 (5th Cir. 1967). The question of whether a taxpayer who, in good faith, believes a regulation to be invalid, can test it in the manner which the petitioners herein did, without incurring such a penalty, is significant. This court should resolve this conflict. *See, e.g.*, Supreme Court Rules, Rule 17(a); *Donaldson vs. United States*, 400 U.S. 517 (1971); *United States vs. Cornell*, 389 U.S. 299 (1967); *C.I.R. vs. Noel's Estate*, 380 U.S. 678 (1965).

In seeking to challenge the marriage penalty, the Drukers consulted the United States Attorney for the Eastern District of New York, and the Chief of the Internal Revenue Service Intelligence Division. As a result of these conversations, they designed a program which, they reasonably believed, would call their protest to the attention of the I.R.S. and allow them to challenge the tax rate schedules, without incurring a penalty for their challenge. In this position, they had strong grounding, for the Fifth Circuit, and a number of Tax Court decisions, have engrafted a "good faith" requirement on the § 6653(a) penalty. *See, e.g., Marcello vs. C.I.R.*, 380 F2d 499 (5th Cir. 1967); *Bennett vs. C.I.R.*, 139 F2d 961 (8th Cir. 1944); *C.I.R. vs. S.A. Woods Machine Co.*, 57 F2d 635 (1st

Cir. 1932); *Hill vs. C.I.R.*, 63 T.C. 225 (1974); *Scott vs. C.I.R.*, 61 T.C. 657 (1974). *Miller vs. United States*, 211 F. Supp. 758 (D. Wyoming 1962); *Brockman Building Corp. vs. C.I.R.*, 21 T.C. 170 (1953), *aff'd.* 231 F2d 145 (9th Cir. 1955) *cert. denied* 350 U.S. 936. Moreover, a later Congress, in enacting 26 U.S.C. § 6694, clearly assumed a reasonable basis test to be part of 26 U.S.C. § 6653(a), for it stated that both were to be interpreted alike, with a reasonable basis exception implied.

Prior to the Second Circuit decision herein, the only decision holding the § 6653(a) penalty to be strictly applicable regardless of the taxpayer's good faith is *Journal vs. C.I.R.*, 46 B.T.A. 841 (1949) *rev'd on other grounds* 134 F2d 165 (7th Cir. 1943). The Seventh Circuit never reviewed the § 6653(a) question; because it reversed upon the question of tax liability. Thus, the Second Circuit is the only Court of Appeals to hold to a strict liability standard. However, this has created confusion and uncertainty in the enforcement of this provision. Thus, this Court should review this case and resolve the confusion.

C. THE COURT BELOW ERRED IN ITS INTERPRETATION OF 26 U.S.C. § 6013 AND ITS RESOLUTION OF THE ISSUE OF ESTOPPEL OF THE GOVERNMENT

In denying the Drukers joint filing status for the year 1976, the court below erred both in its interpretation of *Schweiker vs. Hansen*, 450 U.S. 785 (1981) and its interpretation of § 6013(b). As this question appears to be one of first impression, this court should review it.

The Drukers arranged to secure a re-audit of their 1976 tax return after the Deficiency Notices were filed. After this re-audit, the Drukers were accorded joint filing status, *in writing*, by a recomputation of their tax liability. Thus, one of the conditions set forth in *Schweiker vs. Hansen, supra*, was met, as a person with

authority to do so granted the Drukers the status they sought. Moreover, the Drukers forbore from taking alternative action, for, under 26 U.S.C. § 6013(b(2)(c), the Drukers, unquestionably, could have filed an amended return *after* the notice of deficiency but *before* the filing of the petition herein. Thereafter, they could have elected to sue for a refund. Thus, the court below erroneously denied the Drukers joint filing status.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES TAX COURT

Docket No. 9622-79

JAMES O. DRUKER and JOAN S. DRUKER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the opinion of the Court filed October 15, 1981, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax due from petitioner James O. Druker for the taxable years 1975 and 1976 in the amounts of $538.95 and $2860.83, respectively;

That $79.00 of the deficiency in income tax for the taxable year 1976 has been paid;

That there are no additions to the tax due from petitioner James O. Druker for the taxable years 1975 and 1976 under the provisions of I.R.C. § 6653(a);

That there are deficiencies in income tax due from petitioner Joan S. Druker for the taxable years 1975 and 1976 in the amounts of $557.85 and $1070.00, respectively; and

That there are no additions to the tax due from petitioner Joan S. Druker for the taxable years 1975 and 1976 under the provisions of section 6653(a).

Signed
JUDGE THEODORE TANNENWALD

Entered: February 2, 1982

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

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77 T.C. No. 60

UNITED STATES TAX COURT

JAMES O. DRUKER and JOAN S. DRUKER, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 9622-79
Filed October 15, 1981

Petitioners, husband and wife, filed separate returns as unmarried individuals. Respondent determined that each petitioner is subject to tax at the rates applicable to married individuals filing separately. *Held:* (1) The so-called marriage penalty is not unconstitutional and petitioners are subject to tax at the rates applicable to married individuals filing separately; (2) petitioners are not entitled, under sec. 6013, I.R.C. 1954, to change their filing status to that of married persons filing jointly; (3) home office expense deduction disallowed; and (4) petitioners are not liable for the addition to tax under sec. 6653(a), I.R.C. 1954.

James O. Druker, pro se.

Paula Schwartz Frome, for petitioner Joan S. Druker.

Vincent R. Barrella and *Deborah B.K.L. Rosensweig*, for the respondent.

TANNENWALD, *Chief Judge:* Respondent asserted deficiencies in petitioners' income taxes as follows:

	1975	1976
James O. Druker	$538.95	$3,251.97
Joan S. Druker	782.85	1,309.56

In his answer, respondent alleged that petitioners were liable for additions to tax pursuant to section 6653(a)[1] in the following amounts:

	1975	1976
James O. Druker	$26.95	$162.60
Joan S. Druker	39.14	65.48

After concessions by the parties, the issues remaining are: (1) the constitutionality of the so-called "marriage penalty;" (2) whether, under section 6013, petitioners may change their filing status to joint; (3) whether petitioner James O. Druker is entitled to a home-office deduction for 1976; and (4) whether petitioners are liable for the additions to tax under section 6653(a).

[1]All section references, unless otherwise indicated, are to the Internal Revenue Code of 1954, as amended and in effect during the years in issue, as are all references to the Code. All references to a Rule, unless otherwise indicated, are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. Only those facts necessary to our decision on the disputed issues will be set forth.

Petitioners resided in New York, New York, at the time the petition herein was filed. At all times pertinent to this proceeding, James O. Druker (James) and Joan S. Druker (Joan) were married to each other.

James filed timely Federal income tax returns for 1975 and 1976 as a married individual filing a separate return. However, he computed his tax liability for said years according to the provisions of the Internal Revenue Code of 1954 applicable to an unmarried individual. Joan timely filed her tax returns for 1975 and 1976 in the same manner. Respondent determined that each of the petitioners was subject to tax at the rates applicable to married individuals filing separately.

Prior to the filing of petitioners' 1975 returns, James consulted with the United States Attorney for the Eastern District of New York and with individuals in respondent's Intelligence Division. He explained that he and his wife wished to challenge the marriage penalty, but wanted to be certain that there could be no claims of fraud or willfulness. Following these conversations, petitioners filed their returns for 1975 as described above, see p. 3, *supra*, with the following letter addressed to respondent attached:

Dear Sir:

After due consideration, my wife and I have decided that, although we do not qualify under the existing tax laws, we are going to apply Table X (for single persons) in calculating the amount of income tax due and owing by us for the

calendar year 1975. The reason for this is that we feel most strongly that the present income tax structure unfairly discriminate against working married couples, and as such is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

In order to avoid any legitimate claim of fraud on our part, we are attaching copies of this letter to the separate income tax returns which we are filing on this date. Moreover, we have checked off the "married, filing separately" box on our returns so that the computer will not overlook the discrepancy between our marital status and the fact that we have applied the single persons' table to our returns.

We are perfectly prepared to litigate this matter, and to pay any taxes due plus interest in the event that we do not prevail. We feel that this course is preferable to that of the sham December 31st divorce-January 1st remarriage used by so many couples to legally obtain a single person's filing status. Indeed, we are unable to comprehend why we should pay several thousand dollars more in taxes than if we chose to get a divorce for one day out of each year. We are confident that the Courts will similarly be unable to see the rationale for these obvious inequities.

Each letter ended with a cross-reference to the spouse's social security number to enable respondent to match the returns. The same letter, with the dates changed, was filed with petitioners' 1976 returns.

On April 24, 1979, James requested a recomputation of petitioners' deficiencies for 1975 and 1976 based on joint filing status. Petitioners intended to litigate the constitutionality of the marriage penalty, but wanted the amount of any decision entered against them to be computed using the schedule in section 1(a).

Prior to January 1975 and subsequent to January 1978, James

was an attorney engaged in private practice. From January 1975 to July 1976, he worked in the United States Attorney's Office. From July 1976 to January 1978, he was employed by the Nassau County (New York) District Attorney's Office.

During 1976, neither of his employers required him to maintain an office in his home as a condition of his employment. Nonetheless, during 1976, he maintained an office in the third bedroom of his apartment, which was solely used to hold his law books and legal files from his prior (and planned future) private practice. He reported no income from the private practice of law in 1976.

James claimed $1,440 of the $7,304.90 rental expense he and Joan incurred for their residence as a home office deduction on his 1976 return.

OPINION

The primary issue presented herein is the constitutionality of the so-called "marriage penalty."[2] Although this is the first time this issue has been presented to this Court, other courts have extensively discussed and rejected the arguments asserted herein by petitioners. *Johnson v. United States*, 422 F. Supp. 958 (N.D. Ind. 1976), affd. per curiam sub nom. *Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977), cert. denied 434 U.S. 1012 (1978); *Mapes v. United States*, 217 Ct. Cl. 115, 576 F.2d 896 cert. denied 439 U.S. 1046 (1978). Moreover, we rejected many of these arguments

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[2]The "marriage penalty" is a result of the current tax schedules which provide higher rates and lower standard deductions for married individuals filing separate returns than for single taxpayers. Compare sec. 1(b) with sec. 1(d). See sec. 63(d). For a more extensive discussion of the reasons for, and problems presented by, the marriage penalty, see B. Bittker, "Federal Income Taxation and the Family," 27 Stan. L.Rev. 1389, 1416-1444 (1975); W. Gerzog, "The Marriage Penalty: The Working Couple's Dilemma," 47 Fordham L.Rev. 27 (1978).

when advanced by a single taxpayer who believed that the tax rates then in effect unconstitutionally discriminated against unmarried individuals.[3] *Kellems v. Commissioner*, 58 T.C. 556 (1972), affd. per curiam 474 F.2d 1399 (2d Cir. 1973).

We are in agreement with the result and rationale of *Johnson* and *Mapes*. Since the facts of this case are not in dispute and only legal issues are involved, little would be added by our writing another treatise on this matter. Thus, we shall dispose of most of petitioners' arguments by reference to the discussion of them in the prior cases.

Petitioners primarily rely upon *Hoeper v. Tax Commission*, 284 U.S. 206 (1931). We believe that the distinctions drawn in *Mapes v. United States*, *supra*, between the Supreme Court's holding in *Hoeper* and the instant situation, i.e., that a married individual may file separately and be taxed on only his or her own income, albeit at a rate schedule which depends on marital status, see 576 F.2d at 902, adequately respond to petitioners' arguments.[4] See also *Hospital Data Center of S.C. v. United States*, 634 F.2d 541, 546 n.16 (Ct. Cl. 1980); *Johnson v. United States*, *supra* at 966-968; *Jennemann v. Commissioner*, 67 T.C. 906, 910-911 (1977); *Kellems v. Commissioner*, 58 T.C. at 560.

Petitioners next argue that the separate tax rates work an invidious discrimination against married women and are, there-

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[3]Prior to 1969, single taxpayers could pay as much as 40.9 percent higher Federal income taxes than a married couple with equal income. The Tax Reform Act of 1969, Pub. L. 91-172, sec. 803(a), 83 Stat. 678, lowered the rates applicable to single people to no more than 120 percent of that paid by a married couple with the same aggregate income.

[4]The continuing vitality of *Hoeper v. Tax Commission*, 284 U.S. 206 (1931), has been questioned. See generally *Johnson v. United States*, 422 F. Supp. 958, 967, n.23 (N.D. Ind. 1976), affd. per curiam sub nom. *Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977), cert. denied 434 U.S. 1012 (1978).

fore, unconstitutional. Relying on *Califano v. Westcott*, 443 U.S. 76 (1979), they argue that, since the rate schedules have roots in the archaic premise that married women remain at home as non-earners to bear and raise children, the rate schedules cannot withstand scrutiny under the due process clause of the Fifth Amendment. The statute struck down in *Westcott* is clearly distinguishable; it limited benefits to families with unemployed fathers without regard to which spouse was the family bread-winner. The Court focused on the gender distinction not being substantially related to any important and valid Governmental objective. The provisions of the Code being challenged herein, however, are gender neutral. See sections 1 and 63(d). See generally sections 7701(a)(17) and (d)(3). Thus, they do not suffer from that constitutional infirmity. See generally *Mapes v. United States*, 217 Ct. Cl. at 123-125, 576 F.2d at 901-902; *Johnson v. United States*, 422 F. Supp. at 968-969.

Finally, petitioners argue that, in light of the recent state court decisions removing certain of the property right distinctions between married people and couples simply cohabiting, see *Morone v. Morone*, 50 N.Y. 2d 481, 407 N.E. 2d 438, 429 N.Y.S. 2d 592 (1980); *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), the Federal laws drawing such distinctions no longer have a rational basis. This argument is, at best, disingenuous. *Marvin* and *Morone* merely held that unmarried individuals cohabiting may freely contract to share their earnings, property, or expenses. In fact, both cases strongly supported the institution of marriage. 50 N.Y. 2d at 484; 407 N.E. 2d at 439, 429 N.Y.S. 2d at 593; 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.[5] Petitioners would have us hold that the distinction drawn

[5]In *Marvin v. Marvin*, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976), the Court stated, "Lest we be misunderstood, however, we take this o casion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution."

between married and unmarried individuals is irrational on the basis of their erroneous interpretations of state court decisions. This we are not prepared to do.

Moreover, although state law determines marital status, see *Boyter v. Commissioner,* 74 T.C. 989, 994 (1980), Federal law, including the Constitution, governs the validity and interpretation of the Federal tax consequences of such a determination. The constitutional parameters of the question before us have been thoroughly explored in *Johnson v. United States, supra,* and *Mapes v. United States, supra,* and the attack on the so-called "marriage penalty" rejected in full recognition of the fact that some inequity (and indeed discrimination) is involved but that "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact." See *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42 (1973). We think it sufficient for us to state that the difference in exposure to tax liability between married and single persons[6] do not rise to the level of an impermissible interference with the enjoyment of the fundamental right to marry or remain married.

Having rejected petitioners' claim that the rate schedules and other provisions making up the "marriage penalty" are unconstitutional, we turn next to their alternative argument that they are entitled to change their filing status from married filing separately to married filing jointly. Although, in general, taxpayers may change their filing status from separate to joint, section 6013(b)(1), the making of such an election is limited by section 6013(b)(2).

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[6]We note that taxpayers subject to the current "marriage penalty" will receive partial relief beginning in 1982. Economic Recovery Tax Act of 1981, Pub. L. 97-34, sec. 103(a), 95 Stat. 187 (effective for taxable years beginning after December 31, 1981).

Section 6013(b)(2) provides, in relevant part:

(2) Limitations for making of election.—The election provided for in paragraph (1) may not be made—

* * *

(B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or

(C) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6216, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213;***

Applying this section to the record in this case, petitioners are precluded from electing joint status for 1975 by virtue of subsections 6013(b)(2)(B)[7] and 6013(b)(2)(C). The latter subsection precludes this election for 1976 as well. Petitioners were each mailed deficiency notices on April 13, 1979. Even assuming that they requested a shift to joint filing status in their conversations and letter of April 24, 1979, the subsequent filing of their petitions with this Court precludes such an election at that time. Sec. 6013(b)(2)(C); *Jacobson v. Commissioner,* 73 T.C. 610, 614 (1979); *Richardson v. Commissioner,* 72 T.C. 818, 826 (1979); *Kirby v. Commissioner,* 35 T.C. 306, 311 (1960).

Petitioners argue that respondent should be estopped from denying their election to file jointly because his agents told them that filing a petition would not prevent it. Petitioners have

[7]Section 6013(b)(2)(B) bars joint filing status for petitioners for 1975 because more than three years expired from the last date prescribed by law for filing their returns, April 15, 1976, see sec. 6072, and the earliest date in the record indicating they may have requested an alternative joint filing status, April 24, 1979.

abysmally failed to convince us, as a factual matter, that they received such advice from respondent's agents. Rule 142(a). Assuming arguendo that they had made such a showing, respondent is not bound by the erroneous advice of his agents, especially when it is contrary to the statute. *Dixon v. United States*, 381 U.S. 68 (1965); *Automobile Club v. Commissioner*, 353 U.S. 180 (1957); *Kirby v. Commissioner, supra*. Thus, petitioners' deficiencies for 1975 and 1976 are to be computed using the schedules for married individuals filing separately.

We turn next to the home office deduction claimed by James for 1976. The record is clear that he has failed to satisfy the requirements of section 280A, which governs this deduction. He was an employee over the course of the year and has made no showing that the office was used for the convenience of his employer. Section 280A(c)(1). Moreover, he reported no income which might have been derived from a separate trade or business for which he may have used the room as the principal place of business. Thus, section 280A(c)(5) also precludes this deduction.

Rather than argue that he is entitled to a deduction for a home office, James contends that the room was used as a storage facility for his law library and files, in lieu of renting a separate warehouse. Since he was not in the trade or business of selling products at wholesale or retail, however, he is not entitled to a home storage deduction. Section 280A(c)(2).

The final issue is whether petitioners are liable for the addition to tax for intentionally disregarding the rules and regulations. Section 6653(a). Since this issue was raised in the answer, the burden of proof is on respondent. Rule 142(a). Respondent has neither asserted nor introduced evidence that petitioners' underpayment derived from the settled issues or that the claimed home storage deduction was due to negligence or intentional disregard

of the rules. Instead, he asserts solely that their use of the unmarried individual tax schedules constituted an intentional disregard of the rules and that the letter attached to their returns acknowledged this.

We think it clear that petitioners took their action deliberately and in open disregard of the requirements of the statute. There are some early indications that, insofar as section 6653(a) is concerned, reasonable basis for a taxpayer's action might not be considered as justification for ignoring respondent's rules and regulations. See *Journal Co. v. Commissioner*, 46 B.T.A. 841, 846 (1942), revd. on another issue 134 F.2d 165 (7th Cir. 1943). See also S. Rept. 1622, 83d Cong., 2d Sess. 59 (1954), and H. Rept. 2543, 83d Congress, 2d Sess. 80 (1954), wherein an unsuccessful attempt to deal directly with this particular problem is set forth. But it appears that, although respondent's regulations under section 6653(a) do not speak directly to the subject of "reasonable basis," such a requirement is involved, under certain circumstances, both in the case of negligence and in that of intentional disregard of respondent's rules and regulations.[8] Compare section 1.6694-1(a)(4), Income Tax Regs., with section 301.6653-1(a), Proc. & Adm. Regs. We think it important to emphasize that petitioners' position herein is not so frivolous and meritless as to fall within the ambit of numerous cases involving even sincere taxpayers where the addition to tax under section 6653(a) has been imposed, e.g., *Tyner v. Commissioner*, T.C. Memo. 1977-375; *Runnings v. Commissioner*, T.C. Memo. 1977-214. To be sure, the position which petitioners sought to sustain herein has been rejected in two courts, see *Johnson v. United States, supra*, and *Mapes v. United States, supra*. But it is common knowledge

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[8]We note in passing that, in practically every decided case under section 6653(a), the issues of negligence and such intentional disregard are joined together and not subjected to separate analysis.

that the "marriage penalty" has been the subject of widespread comment and discussion, including extensive legislative consideration. Under these circumstances, we think that petitioners cannot be said to have maintained a position which was frivolous or meritless. Accordingly, we think that they should not be penalized for seeking to litigate the issue and that the addition to tax under section 6653(a) should not be imposed.

Decision will be entered under Rule 155.

APPENDIX B

24

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 108, 115, 116—August Term, 1982

(Argued September 16, 1982

Decided December 22, 1982)

Docket Nos. 82-4063, 82-4065, 82-4073

JAMES O. DRUKER and JOAN S. DRUKER,

Petitioners-Appellants-Cross-Appellees,

—v.—

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee-Cross-Appellant.

Before:

FEINBERG, *Chief Judge,*
and FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal by taxpayers from so much of a judgment of the Tax Court, Tannenwald, *Chief Judge,* 77 T.C. 867

(1981), as (1) rejected their constitutional challenge to provisions of the Internal Revenue Code which have the effect of requiring them to pay a higher tax as a married couple than two single individuals with the same income; (2) denied them leave to change their filing status from married filing separately to married filing jointly; and (3) denied a deduction for 1976 for the cost of a room in their apartment where the husband stored law books. Cross-appeal by the Commissioner from so much of the judgment as refused to assess an additional 5% pursuant to I.R.C. § 6653(a) for intentional disregard of rules or regulations. Affirmed on taxpayers' appeal; reversed on Commissioner's cross-appeal.

James O. Druker, Mineola, NY, Petitioner, *Pro Se*.

Paula Schwartz Frome, Mineola, NY, *for Petitioner Joan S. Druker.*

William French Smith, Attorney General, United States Department of Justice, Washington, DC (Glenn L. Archer, Jr., Assistant Attorney General, Michael L. Paup, Gary R. Allen, Elaine F. Ferris, Attorneys, Tax Division, Department of Justice, Washington, DC), *for Respondent-Cross-Appellant Commissioner of Internal Revenue.*

FRIENDLY, *Circuit Judge*:

We have here an appeal by taxpayers and a cross-appeal by the Commissioner from a judgment after trial before Chief Judge Tannenwald of the Tax Court, 77 T.C. 867 (1981).

I.

The principal issue on the taxpayers' appeal is the alleged unconstitutionality of the so-called "marriage penalty". The issue relates to the 1975 and 1976 income tax returns of James O. Druker and his wife Joan. During the tax years in question James was employed as a lawyer, first by the United States Attorney for the Eastern District of New York and later by the District Attorney of Nassau County, New York, and Joan was employed as a computer programmer. For each of the two years they filed separate income tax returns, checking the status box entitled "married filing separately". In computing their respective tax liabilities, however, they applied the rates in I.R.C. § 1(c) for "Unmarried individuals" rather than the higher rates prescribed by § 1(d) for "Married individuals filing separate returns". Prior to undertaking this course of action, James consulted with the United States Attorney for the Eastern District and with members of the Intelligence Division of the IRS, explaining that he and his wife wanted to challenge the constitutionality of the "marriage penalty" without incurring liability for fraud or willfulness. Following these conversations they filed their returns as described, attaching to each return a letter explaining that, although married, they were applying the tax tables for single persons because they believed that the "income tax structure unfairly discriminates against working married couples" in violation of the equal pro-

tection clause of the fourteenth amendment. The Tax Court rejected this constitutional challenge, sustaining the Commissioner's determination that the Drukers were subject to tax at the rates provided in § 1(d) for married persons filing separately.

Determination of the proper method for federal taxation of the incomes of married and single persons has had a long and stormy history. See generally, Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1399-1416 (1975). From the beginning of the income tax in 1913 until 1948 each individual was taxed on his or her own income regardless of marital status. Thus, as a result of the progressive nature of the tax, two married couples with the same aggregate income would often have very different tax liabilities—larger if most of the income belonged to one spouse, smaller as their incomes tended toward equality. The decision in *Poe v. Seaborn,* 282 U.S. 101 (1930), that a wife was taxable on one half of community income even if this was earned solely by the husband, introduced a further element of geographical inequality, since it gave married couples in community property states a large tax advantage over similarly situated married couples with the same aggregate income in common law states.

After *Poe* the tax status of a married couple in a community property state differed from that of a married couple in a common law state in two significant respects. First, each community property spouse paid the same tax as an unmarried person with one-half the aggregate community income, whereas each common law spouse paid the same tax as an unmarried person with the same individual income. Consequently, marriage usually reduced a couple's tax burden if they resided in a community property state but was a neutral tax event for couples

in common law states. Second, in community property states all married couples with the same aggregate income paid the same tax, whereas in common law states a married couple's tax liability depended on the amount of income each spouse earned. See Bittker, *supra,* 27 Stan. L. Rev. at 1408.

The decision in *Poe* touched off something of a stampede among common law states to introduce community property regimes and thereby qualify their residents for the privilege of income splitting. The Supreme Court's subsequent decision in *Commissioner v. Harmon,* 323 U.S. 44 (1944), that the income-splitting privileges did not extend to couples in states whose community property systems were elective, slowed but did not halt this movement. The result was considerable confusion and much upsetting of expectations founded on long experience under the common law. Congress responded in 1948 by extending the benefits of "income splitting" to residents of common law as well as community property states. Revenue Act of 1948, ch. 168, 62 Stat. 110. Pursuant to this Act, every married couple was permitted to file a joint return and pay twice the tax that a single individual would pay on one-half of their total income. This in effect taxed a married couple as if they were two single individuals each of whom earned half of the couple's combined income. The Act not only reduced the tax burden on married couples in common law states; it also ensured that all married couples with the same aggregate income paid the same tax regardless of the state in which they lived ("geographical uniformity") and regardless of the relative income contribution of each spouse ("horizontal equity").

While the 1948 Act was good news for married couples, it placed singles at a serious disadvantage. The tax liabil-

ity of a single person was now sometimes as much as 41% greater than that of a married couple with the same income. S. Rep. No. 552, 91st Cong., 1st Sess. 260 (1969). Although constitutional challenges to the "singles' penalty" were uniformly rejected, see, e.g., *Kellems v. Commissioner,* 58 T.C. 556 (1972), *aff'd per curiam,* 474 F.2d 1399 (2 Cir.), *cert. denied,* 414 U.S. 831 (1973); *Faraco v. Commissioner,* 261 F.2d 387 (4 Cir. 1958), *cert. denied,* 359 U.S. 925 (1959), the single taxpayer obtained some relief from Congress. The Tax Reform Act of 1969, Pub. L.No. 91-172, 83 Stat. 487 (1969), increased the number of tax schedules from two to four: § 1(a) for marrieds filing jointly; § 1(b) for unmarried heads of households; § 1(c) for unmarried individuals; and § 1(d) for married individuals filing separately.[1] The schedules were set so that a single person's tax liability under § 1(c) would never be more than 120% that of a married couple with the same income filing jointly under § 1(a). See S. Rep. No. 552, *supra,* at 260-62.

The 1969 reform spawned a new class of aggrieved taxpayers—the two wage-earner married couple whose combined tax burden, whether they chose to file jointly under § 1(a) or separately under § 1(d), was now greater than it would have been if they had remained single and filed under § 1(c). It is this last phenomenon which has been characterized, in somewhat loaded fashion, as the

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1 The rates set under § 1(d) were the pre-1969 rates for single taxpayers. So disadvantageous is this schedule that only about 1% of married couples file separately. Staff of the Joint Committee on Taxation, Report on the Income Tax Treatment of Married Couples and Single Persons, 96th Cong., 2d Sess. 48 (1980). As a general rule, married taxpayers file separately only when they are so estranged from one another that they do not wish to sign a joint return or when separate filing enables one spouse to exceed the 3% of income floor for medical deductions. *Id.* at 9. See Bittker, *supra,* 27 Stan. L. Rev. at 1414.

"marriage penalty" or "marriage tax".[2] Here, again, while constitutional attack has been unavailing, see *Johnson v. United States,* 422 F.Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom. Barton v. United States,* 550 F.2d 1239 (7 Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978); *Mapes v. United States,* 576 F.2d 896 (Ct. Cl.), *cert. denied,* 439 U.S. 1046 (1978), as well as the decision here under review, Congress has acted to provide relief. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 103, 95 Stat. 172, 187, allows two-earner married couples a deduction from gross income, within specified limits, equal to 10% of the earnings of the lesser-earning spouse.

Subsequent to the decisions in *Johnson* and *Mapes,* the Supreme Court made explicit in *Zablocki v. Redhail,* 434 U.S. 374 (1978), what had been implicit in earlier decisions, that the right to marry is "fundamental". The Court, however, citing *Califano v. Jobst,* 434 U.S. 47 (1977), took care to explain that it did "not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be legitimately imposed." 434 U.S. at 386. Whereas differences in race, religion, and political affiliation are almost always irrelevant for legislative purposes, "a dis-

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2 Not all married couples are so "penalized". For the couple whose income is earned primarily or solely by one partner, marriage still offers significant tax savings. As a general rule of thumb, marriage will increase a couple's tax burden as compared with that of two single persons whenever the lesser-earning spouse earns 20% or more of the couple's total income and decrease its tax burden whenever the lesser-earning spouse earns less than 20%. See Gerzog, The Marriage Penalty: The Working Couple's Dilemma, 47 Fordham L. Rev. 27, 28 (1978).

tinction between married persons and unmarried persons is of a different character". *Jobst, supra,* 434 U.S. at 53. "Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status." *Id.*

We do not doubt that the "marriage penalty" has some adverse effect on marriage; indeed, James Druker stated at argument that, having failed thus far in the courts, he and his wife had solved their tax problem by divorcing but continuing to live together. The adverse effect of the "marriage penalty", however, like the effect of the termination of social security benefits in *Jobst*, is merely "indirect"; while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual. See generally, Developments in Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1255 (1980). The tax rate structure of I.R.C. § 1 places "no direct legal obstacle in the path of persons desiring to get married". *Zablocki, supra*, 434 U.S. at n. 12. Nor is anyone "absolutely prevented" by it from getting married, *id.* at 387. Moreover, the "marriage penalty" is most certainly not "an attempt to interfere with the individual's freedom [to marry]". *Jobst, supra*, 434 U.S. at 54. It would be altogether absurd to suppose that Congress, in fixing the rate schedules in 1969, had any invidious intent to discourage or penalize marriage—an estate enjoyed by the vast majority of its members. Indeed, as has been shown, the sole and express purpose of the 1969 reform was to provide some relief for the single taxpayer. See S. Rep. No. 552, *supra*, at 260-261. Given this purpose Congress had either to abandon the principle of horizontal equity between married couples, a principle which had been established by the 1948 Act and the constitutionality of which has not been challenged, or to

impose a "penalty" on some two-earner married couples. It was put to this hard choice because, as Professor Bittker has shown, *supra*, 27 Stan. L. Rev. at 1395-96, 1429-31, it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual's tax liability is unaffected by changes in marital status.[3] See also Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working: Hearings Before the House Committee on Ways and Means, 92d Cong., 2d Sess. 78-79 (1972) (Statement of Edwin S. Cohen, Assistant Secretary for Tax Policy) ("No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time."); Note, The Case for Mandatory Separate Filing by Married Persons, 91 Yale L.J. 363, 365 n.6 (1982) (mathematical proof of the logical inconsistency among progressivity, marriage neutrality, and horizontal equity between married couples). Faced with this choice, Congress in 1969 decided to hold fast to horizontal equity, even at the price of imposing a "penalty" on two-earner married couples like the Drukers. There is nothing in the equal protection clause that required a different choice. Since the objectives sought by the 1969 Act—the maintenance of horizontal equity and progressivity, and the reduction of the differential between single and married taxpayers—were clearly compelling, the tax rate schedules

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[3] Professor Bittker puts it thus, 27 Stan. L. Rev. at 1430-31:

> Another way to describe this collision of objectives is that the tax paid by a married couple must be (a) greater than they paid before marriage, in which event they are subject to a marriage penalty, (b) less than they paid before marriage, in which event unmarried persons are subject to a singles penalty, or (c) unchanged by marriage, in which event equal-income married couples are subject to unequal taxes.

in I.R.C. § 1 can survive even the "rigorous scrutiny" reserved by *Zablocki* for measures which "significantly interfere" with the right to marry. Cf. *Johnson*, *supra*, 422 F. Supp. at 973-74. Clearly, the alternative favored by the Drukers, that married persons be permitted to file under § 1(c) if they so wish, would entail the loss of horizontal equity.

In the area of family taxation every legislative disposition is "virtually fated to be both overinclusive and underinclusive when judged from one perspective or another". The result, as Professor Bittker has well said, is that there "can be no peace in this area, only an uneasy truce." 27 Stan. L. Rev. at 1443. Congress must be accorded wide latitude in striking the terms of that truce. The history we have reviewed makes clear that Congress has worked persistently to accommodate the competing interests and accomplish fairness. While we could elaborate still further, we think that this, along with the discussion in *Johnson*, *Mapes*, and in Chief Judge Tannenwald's opinion below, is sufficient to show that what the Drukers choose to call the "marriage penalty" deprived them of no constitutional right. Whether policy considerations warrant a further narrowing of the gap between the schedules applied to married and unmarried persons is for Congress to determine in light of all the relevant legislative considerations.

II.

The Drukers contend that if their constitutional argument does not prevail, they should at least have been permitted to make a late filing of a joint return for 1976 under I.R.C. § 6013(b), and thereby reduce the deficiency from the excess of the § 1(d) over the § 1(c) rates to the

considerably smaller excess of the § 1(a) over the § 1(c) rates.

I.R.S. § 6013(b)(1) states the general rule to be:

> Except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may nevertheless make a joint return for such taxable year.

This switching privilege, however, is sharply limited by § 6013(b)(2) which provides, so far as here pertinent:

> The election provided for in paragraph (1) may not be made—
>
> (A) unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return; or
>
> (B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or
>
> (C) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213 . . . .

The deficiency notices for both 1975 and 1976 were mailed on April 13, 1979. On April 24 James Druker had a conversation with IRS Agent Spell which was memorialized in a letter from Druker of that date. At trial Druker

was prevented from testifying as to what Agent Spell advised him in this conversation because the judge erroneously sustained an objection by counsel for the Commissioner that the statement of the IRS agent was inadmissible hearsay.[4] All that Druker's April 24 letter shows is that the agent had agreed to return the Drukers' files to audit for a recomputation of the deficiencies based on a joint filing status. A later letter from Druker, while confirming the correctness of the recomputations made in supplemental reports of the Audit Division and agreeing to pay the sums there shown in the event their Tax Court petition proved unsuccessful, stated that the Drukers could not sign the reports since this would waive their right to contest the "marriage tax" before the Tax Court.

The Drukers now contend that this episode estops the Commissioner from refusing to accord them the benefit of joint filing for 1976 should their constitutional claim fail. They make no such connection with respect to their 1975 returns, presumably because the 3-year period prescribed by § 6013(b)(2)(B) had expired some nine days before the April 24, 1979, conversation with Agent Spell.

The Drukers' briefs shift uneasily between asserting that Agent Spell had represented that the supplemental report of the Audit Division relieved the Drukers of the need to file a formal amended joint return under § 6013(b)(1) and that she had assured them that the Commissioner had also agreed to waive the provision in § 6013(b)(2)(C) which withdraws the switching privilege after deficiency notices have been mailed if the taxpayer files a timely petition with the Tax Court. If the agent's

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4 The statement of the Agent was not "offered in evidence to prove the truth of the matter asserted", FRE 801(c), but was offered simply to show that the agent said whatever she did.

alleged representation was only the former, which is the maximum fairly inferable from Druker's letters, it would avail the taxpayers nothing since, under § 6013(b)(2)(C), the filing of a timely petition with the Tax Court would annul any election of joint status, by formal amended return or otherwise, made after April 13, 1979, the date on which the deficiency notices were mailed. See *Jacobson v. Commissioner*, 73 T.C. 610 (1979). But even if Agent Spell's representation had been the latter, which we think exceedingly unlikely in view of Druker's failure to mention this in his confirmatory letter of April 24, 1979, the case would still be a long way from what is required to meet the standards for invoking an estoppel against the Government enunciated in *Schweiker v. Hansen*, 450 U.S. 785 (1981), and the other decisions of the Court there cited.

Beyond all this, we do not see why the issue is not resolved against the taxpayers in any event by § 6013(b)(2)(A), since they nowhere assert that the agent orally relieved them of the requirement of payment "in full at or before the time of the filing of the joint return". However, since the Tax Court did not mention this point and the Commissioner relegates it to a footnote in his brief, we have not relied upon it here.

III.

With respect to the disallowance of the home office or storage deduction claimed by James O. Druker for 1976, we can do no better than quote the opinion of the Tax Court, 77 T.C. at 874:

> The record is clear that he has failed to satisfy the requirements of section 280A, which governs this deduction. He was an employee over the course of

the year and has made no showing that the office was used for the convenience of his employer. Sec. 280A(c)(1). Moreover, he reported no income which might have been derived from a separate trade or business for which he may have used the room as the principal place of business. Thus, section 280A(c)(5) also precludes this deduction.

Rather than argue that he is entitled to a deduction for a home office, James contends that the room was used as a storage facility for his law library and files, in lieu of renting a separate warehouse. Since he was not in the trade or business of selling products at wholesale or retail, however, he is not entitled to a home storage deduction. Sec. 280A(c)(2).

IV.

We come finally to the Commissioner's cross-appeal from the Tax Court's refusal to impose a 5% addition for "intentional disregard of rules and regulations" under I.R.C. § 6653(a). This section provides:

> Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.—If any part of any underpayment (as defined in subsection (c)(1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

See also Treas. Reg. § 301.6653-1(a) (incorporating the statutory language). In computing their respective tax

liabilities the Drukers applied the rates in I.R.C. § 1(c) for "Unmarried individuals" instead of the higher rates prescribed by § 1(d) for "Married individuals filing separate returns" as the regulations required. There was, to be sure, nothing furtive or fraudulent in this; they checked the "married filing separately" status box on their returns, cross-referenced the returns by providing each other's Social Security number, and attached to each return a letter explaining what they were doing and why. Nevertheless, the record leaves no doubt that in using rate schedules applicable only to unmarried persons, they intentionally violated Section 1 of the Code and the rules and regulations promulgated thereunder, see Treas. Reg. § 1.1-1(a).

While conceding that the Drukers acted "deliberately and in open disregard of the requirements of the statute", the Tax Court nonetheless disallowed the 5% addition on the ground that the Drukers' "position herein is not so frivolous and meritless as to fall within the ambit of numerous cases involving even sincere taxpayers where the addition to the tax under section 6653(a) has been imposed", that "it is common knowledge that the 'marriage penalty' has been the subject of widespread comment and discussion, including extensive legislative consideration",[5] and that "[a]ccordingly [the Drukers]

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5 We do not grasp the force of this. Many tax issues, e.g., whether capital gains should be taxed and, if so, what the rate and the holding period should be; the alleged "double taxation" of so much of corporate profits as is declared as dividends; indexing of income to avoid "bracket creep" due to inflation, etc., have likewise been and doubtless will continue to be discussed for years. The Tax Court could hardly have meant that persons sincerely entertaining views on such matters differing from the legislators' could resort to self-help without incurring the 5% addition to the tax. If the distinction is thought to be that the Drukers raised constitutional and not mere policy objections, there is no showing of widespread discussion of that. Moreover the generous attitude of the Tax Court presumably would have to carry

should not be penalized for seeking to litigate the issue." 77 T.C. at 875. We think the Tax Court took unto itself a dispensing power not granted by Congress.

The statutory language, "there shall be added", could hardly be clearer. The reasonableness of a taxpayer's action may indeed be relevant when he is charged with negligence but not when he admittedly has flouted applicable rules and regulations which he fully understood. Departure from the natural and ordinary meaning of the words, whose literal application does not result in any manifestly absurd or unfair result, could be justified only if there were other evidence that the over-all purpose of Congress would be better served by such a reading. We find no sufficient evidence of this.

The five percent addition in § 6653(a) for "intentional disregard of rules and regulations" derives from § 250(b) of the Revenue Act of 1921. 42 Stat. 265. Its appearance on the statute books at that time could hardly have been fortuitous. The very same Act provided in § 250(d) that a taxpayer notified of a deficiency must be "given a period of not less than 30 days . . . to file an appeal and show cause or reason why the . . . deficiency should not be paid". 42 Stat. 266. Though in some ways imperfect,[6] this prepayment remedy was thoroughly revolutionary. Hitherto, a taxpayer had been required, on pain of

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over to persons who sincerely dispute the legality of their being subjected to income taxation to support activities such as the Vietnam war or nuclear armament of which they strongly disapprove and who make fully disclosed deductions from their taxes on that account.

6 Appeal was to the Committee on Appeals and Review, established by the Commissioner within the Internal Revenue Bureau. Dissatisfaction with this arrangement led in short order to the creation of an independent Board of Tax Appeals. Revenue Act of 1924, § 900, 43 Stat. 336 (1924). See H.R. Rep. No. 179, 68th Cong., 1st Sess. 7-8 (1924).

distraint, to pay any deficiency assessed within ten days of notice and demand. See S. Rep. No. 275, 67th Cong., 1st Sess. 20-21 (1921). The collector's assessment had "the force of a judgment, and if the amount assessed [was] not paid when due, administrative officials [could] seize the debtor's property to satisfy the debt". *Bull v. United States*, 295 U.S. 247, 259-60 (1935). Only after full payment of the amount assessed could the taxpayer bring a suit for a refund in the district court or Court of Claims. 24 Stat. 505 (current version at 28 U.S.C. §§ 1346, 1491). See *Flora v. United States*, 362 U.S. 145 (1960).

It was altogether natural that Congress, in relieving taxpayers of the harsh necessity of making payment first and then seeking refund in the courts and in enabling them to avoid the Government's power of distraint, should take care that the collection of taxes not be unduly delayed. The addition of 5 percent whenever underpayment was due to "intentional disregard of authorized rules and regulations", 42 Stat. 265, was doubtless designed in good part to deter taxpayers from abusing the new remedy by intentionally underpaying and then contesting the deficiency assessed.[7] Taxpayers who wished to test the validity of rules and regulations without risking the 5 percent addition were not left without recourse; they could still pay the tax shown to be due and then sue for a refund.

It is thus not surprising that the Board of Tax Appeals, in what appears to have been its first clear encounter with

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[7] Sec. 250(b) of the Revenue Act of 1918 had imposed a 5% addition where "the understatement is due to negligence". 40 Stat. 1083. The 1921 Act amended § 250(b) to provide that the 5% addition be imposed as well where the deficiency is due to "intentional disregard" of rules and regulations. 42 Stat. 265.

the problem, held in a thoroughly considered opinion that "[h]arsh though the conclusion may seem", the 5 percent addition was mandatory even where the taxpayer had reasonably believed, on the advice of counsel, that a regulation issued by the Commissioner was invalid. *The Journal Co. v. Commissioner*, 46 B.T.A. 841, 845-46 (1942), *rev'd on other grounds*, 134 F.2d 165 (7 Cir. 1943). Taxpayers have not cited to us any case prior to the instant one in which the Board of Tax Appeals, the Tax Court, or any reviewing court has ever departed from the rule announced in *The Journal Co.*. The cases cited by taxpayers are all distinguishable. They relied on the fact that the taxpayers themselves did not know what they were doing, *Hill v. Commissioner*, 63 T.C. 225, 251-52 (1974); *Bennett v. Commissioner*, 139 F.2d 961, 966-67 (8 Cir. 1944); or believed, albeit erroneously, that what they had done complied with the regulations, *Commissioner v. S.A. Woods Mach. Co.*, 57 F.2d 635 (1 Cir. 1932); *Brockman Building Corp. v. Commissioner*, 21 T.C. 175, 191 (1953); *Scott v. Commissioner*, 61 T.C. 654 (1974), or had been charged merely with negligence, *Miller v. United States*, 211 F. Supp. 758 (D. Wyo. 1962). The dicta in *Marcello v. Commissioner*, 380 F.2d 499, 506 and n.20 (5 Cir. 1967), do not support a broad "reasonable basis" exception of the sort urged by taxpayers. Indeed, *Marcello* cites *The Journal Co.*, *id.*, at n.21, without any intimation that it does not state the correct rule.

The history of the 1954 Code, referred to but not discussed by the Tax Court, tends to confirm the desire of Congress to leave the construction adopted in *The Journal Co.* undisturbed. The Senate Finance Committee proposed an amendment which would have provided that the 5% addition not be applied ". . . where a taxpayer in good faith intentionally disregards rules and regulations

because he reasonably believes the rules or regulations are invalid and attaches to his return an adequate statement which sets forth the rules or regulations disregarded and the grounds for believing them invalid." S. Rep. No. 1622, 83d Cong., 2d Sess. at 591, *reprinted in* [1954] 3 U.S. Code Cong. and Ad. News 4621, 5240. This amendment was deleted in conference. H.R. Conf. Rep. No. 2543, 83d Cong., 2d Sess. at 80, *reprinted in* [1954] 3 U.S. Code Cong. and Ad. News 5280, 5342. No explanation for the deletion was given. Although other interpretations are possible, the most reasonable is that in 1954 Congress was satisfied with the language of the statute as construed in *The Journal Co.* and other cases decided up to that time and did not wish to allow the very exception asserted by taxpayers here.

Against this the taxpayers rely on I.R.C. § 6694(a), enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520. This imposes a $100 penalty on a tax preparer for any return or refund on which an understatement of tax liability is caused by his intentional or negligent disregard of rules and regulations. While the pertinent language of the statute itself is virtually identical to § 6653(a), the Treasury regulation promulgated thereunder, § 1.6694-1(a)(4), unlike the regulation under § 6653(a), see § 301.6653-1(a), expressly provides for a "reasonable basis" exemption: "If a preparer in good faith and with reasonable basis takes the position that a rule or regulation does not accurately reflect the Code and does not follow it, the preparer has not negligently or intentionally disregarded the rule or regulation". More important, the regulation provides further that: "This test [the reasonable basis test] shall be applied in the same manner as it is applied under section 6653(a) and the regulations thereunder (relating to disregard of rules and

regulations by taxpayers)." The wording of this regulation appears to derive directly from Congressional committee reports on the 1976 Act. The House Report stated that:

> The penalty [for tax preparers] applies generally to every negligent or intentional disregard of . . . rules and regulations except that a good faith dispute by an income tax return preparer about an IRS interpretation of a statute (expressed in regulations or rulings) is not considered a negligent or intentional disregard of rulings and regulations. The provision is thus to be interpreted in a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of IRS rules and regulations by taxpayers on their own returns.

H. Rep. No. 658, 94th Cong., 1st Sess. 278 (1975). See also, Staff of the Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. at 351.

The Commissioner concedes that this suggests that the 1976 Congress believed the 'intentional disregard' language of § 6653(a) to be also subject to a reasonable basis limitation. Brief at 44. He seeks to avoid the effect of this, however, on the grounds that, as discussed above, Congress in 1954 specifically declined to adopt such a limitation when it enacted § 6653(a) and that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). There is force in the Commissioner's argument. The Congressional decision in 1954 not to adopt a "reasonable basis" exception represented the deliberate and considered action of a conference committee with respect to the very provision here

at issue. The 1976 episode, apart from being another 22 years down the road, consisted of talk about § 6653(a) incident to enactment of a new section of the tax law in a committee report which few members may have seen. When all is said and done, the most that the 1976 episode could be taken as proving is that some members of the 94th Congress were mistaken as to the long settled construction of what is now § 6653(a) and that the Commissioner in his regulations adopted the statement in the legislative history. Much more than this is needed to overturn a construction settled since 1942.

More important, even if we were to assume for argument's sake only that the reasonable basis limitation of § 6694(a), as expounded in the legislative history and Treas. Reg. § 1.6694-1(a)(4), could properly be read into § 6653(a), this would not help the Drukers. For their position is not that a "rule or regulation does not accurately reflect the Code", § 1.6694-1(a)(4), but rather that Section 1 of the Code is inconsistent with the Constitution. There is nothing in the legislative history of § 6694(a) or in the language of the Treasury regulation promulgated thereunder to suggest that the 1976 Congress believed that a reasonable basis limitation applies in such a case. On the contrary, the House Report and the Joint Committee Explanation of the 1976 Act both clearly stated that a tax return preparer is to enjoy the benefit of the reasonable basis exemption only where the dispute is "about an IRS interpretation of a statute". H. Rep. No. 658, *supra*, at 278; Joint Committee Explanation, *supra*, at 351. A fortiori, a taxpayer who has intentionally disregarded a rule or regulation can not claim the benefit of any such exemption where, as here, his dispute is with Congress rather than the IRS. We assume that if the Commissioner *desires* to adopt a regulation under

§ 6653(a) or to take other action which would exempt persons like the Drukers from the 5% addition to tax, he is free to do so. Absent this, when the Commissioner seeks the additional 5% tax and the facts show such an intentional although honest disregard of the statute as here, the courts have no dispensing power.

On the taxpayers' appeal the judgment against them is affirmed; on the Commissioner's appeal the judgment refusing to assess the additional 5% required by § 6653(a) is reversed and the case is remanded for the making of an additional assessment.

APPENDIX C

INCOME TAXES

§ 1. Tax imposed

(a) Married individuals filing joint returns and surviving spouses.— There is hereby imposed on the taxable income of every married individual (as defined in section 143) who makes a single return jointly with his spouse under section 6013, and every surviving spouse (as defined in section 2(a)), a tax determined in accordance with the following tables:

(1) For taxable years beginning in 1982.—

If taxable income is:	The tax is:
Not over $3,400	No tax.
Over $3,400 but not over $5,500	12% of the excess over $3,400.
Over $5,500 but not over $7,600	$252, plus 14% of the excess over $5,500.
Over $7,600 but not over $11,900	$546, plus 16% of the excess over $7,600.
Over $11,900 but not over $16,000	$1,234, plus 19% of the excess over $11,900.
Over $16,000 but not over $20,200	$2,013, plus 22% of the excess over $16,000.
Over $20,200 but not over $24,600	$2,937, plus 25% of the excess over $20,200.
Over $24,600 but not over $29,900	$4,037, plus 29% of the excess over $24,600.
Over $29,900 but not over $35,200	$5,574, plus 33% of the excess over $29,900.
Over $35,200 but not over $45,800	$7,323, plus 39% of the excess over $35,200.
Over $45,800 but not over $60,000	$11,457, plus 44% of the excess over $45,800.
Over $60,000 but not over $85,600	$17,705, plus 49% of the excess over $60,000.
Over $85,600	$30,249, plus 50% of the excess over $85,600.

(2) For taxable years beginning in 1983.—

If taxable income is:	The tax is:
Not over $3,400	No tax.
Over $3,400 but not over $5,500	11% of the excess over $3,400.
Over $5,500 but not over $7,600	$231, plus 13% of the excess over $5,500.
Over $7,600 but not over $11,900	$504, plus 15% of the excess over $7,600.
Over $11,900 but not over $16,000	$1,149, plus 17% of the excess over $11,900.
Over $16,000 but not over $20,200	$1,846, plus 19% of the excess over $16,000.
Over $20,200 but not over $24,600	$2,644, plus 23% of the excess over $20,200.
Over $24,600 but not over $29,900	$3,656, plus 26% of the excess over $24,600.
Over $29,900 but not over $35,200	$5,034, plus 30% of the excess over $29,900.

Over $35,200 but not over $45,800	$6,624, plus 35% of the excess over $35,200.
Over $45,800 but not over $60,000	$10,334, plus 40% of the excess over $45,800.
Over $60,000 but not over $85,600	$16,014, plus 44% of the excess over $60,000.
Over $85,600 but not over $109,400	$27,278, plus 48% of the excess over $85,600.
Over $109,400	$38,702, plus 50% of the excess over $109,400.

(3) For taxable years beginning after 1983.—

If taxable income is:	The tax is:
Not over $3,400	No tax.
Over $3,400 but not over $5,500 ...	11% of the excess over $3,400.
Over $5,500 but not over $7,600 ..	$231, plus 12% of the excess over $5,500.
Over $7,600 but not over $11,900 ..	$483, plus 14% of the excess over $7,600.
Over $11,900 but not over $16,000	$1,085, plus 16% of the excess over $11,900.
Over $16,000 but not over $20,200	$1,741, plus 18% of the excess over $16,000.
Over $20,200 but not over $24,600	$2,497, plus 22% of the excess over $20,200.
Over $24,600 but not over $29,900	$3,465, plus 25% of the excess over $24,600.
Over $29,900 but not over $35,200	$4,790, plus 28% of the excess over $29,900.
Over $35,200 but not over $45,800	$6,274, plus 33% of the excess over $35,200.
Over $45,800 but not over $60,000	$9,772, plus 38% of the excess over $45,800.
Over $60,000 but not over $85,600	$15,168, plus 42% of the excess over $60,000.
Over $85,600 but not over $109,400	$25,920, plus 45% of the excess over $85,600.
Over $109,400 but not over $162,400	$36,630, plus 49% of the excess over $109,400.
Over $162,400	$62,600, plus 50% of the excess over $162,400.

(b) Heads of households.—There is hereby imposed on the taxable income of every individual who is the head of a household (as defined in section 2(b)) a tax determined in accordance with the following tables:

(1) **For taxable years beginning in 1982.—**

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $4,400	12% of the excess over $2,300.
Over $4,400 but not over $6,500	$252, plus 14% of the excess over $4,400.
Over $6,500 but not over $8,700	$546, plus 16% of the excess over $6,500.
Over $8,700 but not over $11,800	$898, plus 20% of the excess over $8,700.
Over $11,800 but not over $15,000	$1,518, plus 22% of the excess over $11,800.
Over $15,000 but not over $18,200	$2,222, plus 23% of the excess over $15,000.
Over $18,200 but not over $23,500	$2,958, plus 28% of the excess over $18,200.
Over $23,500 but not over $28,800	$4,442, plus 32% of the excess over $23,500.
Over $28,800 but not over $34,100	$6,138, plus 38% of the excess over $28,800.
Over $34,100 but not over $44,700	$8,152, plus 41% of the excess over $34,100.
Over $44,700 but not over $60,600	$12,498, plus 49% of the excess over $44,700.
Over $60,600	$20,289, plus 50% of the excess over $60,600.

(2) **For taxable years beginning in 1983.—**

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $4,400	11% of the excess over $2,300.
Over $4,400 but not over $6,500	$231, plus 13% of the excess over $4,400.
Over $6,500 but not over $8,700	$504, plus 15% of the excess over $6,500.
Over $8,700 but not over $11,800	$834, plus 18% of the excess over $8,700.
Over $11,800 but not over $15,000	$1,392, plus 19% of the excess over $11,800.
Over $15,000 but not over $18,200	$2,000, plus 21% of the excess over $15,000.
Over $18,200 but not over $23,500	$2,672, plus 25% of the excess over $18,200.
Over $23,500 but not over $28,800	$3,997, plus 29% of the excess over $23,500.
Over $28,800 but not over $34,100	$5,534, plus 34% of the excess over $28,800.
Over $34,100 but not over $44,700	$7,336, plus 37% of the excess over $34,100.
Over $44,700 but not over $60,600	$11,258, plus 44% of the excess over $44,700.

Over $60,600 but not over $81,800	$18,254, plus 48% of the excess over $60,600.
Over $81,800	$28,430, plus 50% of the excess over $81,800.

(3) For taxable years beginning after 1983.—

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $4,400 ...	11% of the excess over $2,300.
Over $4,400 but not over $6,500 ...	$231, plus 12% of the excess over $4,400.
Over $6,500 but not over $8,700 ...	$483, plus 14% of the excess over $6,500.
Over $8,700 but not over $11,800 ..	$791, plus 17% of the excess over $8,700.
Over $11,800 but not over $15,000	$1,318, plus 18% of the excess over $11,800.
Over $15,000 but not over $18,200	$1,894, plus 20% of the excess over $15,000.
Over $18,200 but not over $23,500	$2,534, plus 24% of the excess over $18,200.
Over $23,500 but not over $28,800	$3,806, plus 28% of the excess over $23,500.
Over $28,800 but not over $34,100	$5,290, plus 32% of the excess over $28,800.
Over $34,100 but not over $44,700	$6,986, plus 35% of the excess over $34,100.
Over $44,700 but not over $60,600	$10,696, plus 42% of the excess over $44,700.
Over $60,600 but not over $81,800	$17,374, plus 45% of the excess over $60,600.
Over $81,800 but not over $108,300	$26,914, plus 48% of the excess over $81,800.
Over $108,300	$39,634, plus 50% of the excess over $108,300.

(c) Unmarried individuals (other than surviving spouses and heads of households).—There is hereby imposed on the taxable income of every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in section 2(b) who is not a married individual (as defined in section 143) a tax determined in accordance with the following tables:

(1) For taxable years beginning in 1982.—

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $3,400 ...	12% of the excess over $2,300.
Over $3,400 but not over $4,400 ...	$132, plus 14% of the excess over $3,400.
Over $4,400 but not over $6,500 ...	$272, plus 16% of the excess over $4,400.
Over $6,500 but not over $8,500 ...	$608, plus 17% of the excess over $6,500.

Over $8,500 but not over $10,800 . .	$948, plus 19% of the excess over $8,500.
Over $10,800 but not over $12,900	$1,385, plus 22% of the excess over $10,800.
Over $12,900 but not over $15,000	$1,847, plus 23% of the excess over $12,900.
Over $15,000 but not over $18,200	$2,330, plus 27% of the excess over $15,000.
Over $18,200 but not over $23,500	$3,194, plus 31% of the excess over $18,200.
Over $23,500 but not over $28,800	$4,837, plus 35% of the excess over $23,500.
Over $28,800 but not over $34,100	$6,692, plus 40% of the excess over $28,800.
Over $34,100 but not over $41,500	$8,812, plus 44% of the excess over $34,100.
Over $41,500	$12,068, plus 50% of the excess over $41,500.

(2) For taxable years beginning in 1983.—

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $3,400 . . .	11% of the excess over $2,300.
Over $3,400 but not over $4,400 . . .	$121, plus 13% of the excess over $3,400.
Over $4,400 but not over $8,500 . . .	$251, plus 15% of the excess over $4,400.
Over $8,500 but not over $10,800 . .	$866, plus 17% of the excess over $8,500.
Over $10,800 but not over $12,900	$1,257, plus 19% of the excess over $10,800.
Over $12,900 but not over $15,000	$1,656, plus 21% of the excess over $12,900.
Over $15,000 but not over $18,200	$2,097, plus 24% of the excess over $15,000.
Over $18,200 but not over $23,500	$2,865, plus 28% of the excess over $18,200.
Over $23,500 but not over $28,800	$4,349, plus 32% of the excess over $23,500.
Over $28,800 but not over $34,100	$6,045, plus 36% of the excess over $28,800.
Over $34,100 but not over $41,500	$7,953, plus 40% of the excess over $34,100.
Over $41,500 but not over $55,300	$10,913, plus 45% of the excess over $41,500.
Over $55,300	$17,123, plus 50% of the excess over $55,300.

(3) **For taxable years beginning after 1983.—**

If taxable income is:	The tax is:
Not over $2,300	No tax.
Over $2,300 but not over $3,400 ...	11% of the excess over $2,300.
Over $3,400 but not over $4,400 ...	$121, plus 12% of the excess over $3,400.
Over $4,400 but not over $6,500 ...	$241, plus 14% of the excess over $4,400.
Over $6,500 but not over $8,500 ...	$535, plus 15% of the excess over $6,500.
Over $8,500 but not over $10,800	$835, plus 16% of the excess over $8,500.
Over $10,800 but not over $12,900	$1,203, plus 18% of the excess over $10,800.
Over $12,900 but not over $15,000	$1,581, plus 20% of the excess over $12,900.
Over $15,000 but not over $18,200	$2,001, plus 23% of the excess over $15,000.
Over $18,200 but not over $23,500	$2,737, plus 26% of the excess over $18,200.
Over $23,500 but not over $28,800	$4,115, plus 30% of the excess over $23,500.
Over $28,800 but not over $34,100	$5,705, plus 34% of the excess over $28,800.
Over $34,100 but not over $41,500	$7,507, plus 38% of the excess over $34,100.
Over $41,500 but not over $55,300	$10,319, plus 42% of the excess over $41,500.
Over $55,300 but not over $81,800	$16,115, plus 48% of the excess over $55,300.
Over $81,800	$28,835, plus 50% of the excess over $81,800.

(d) **Married individuals filing separate returns.**—There is hereby imposed on the taxable income of every married individual (as defined in section 143) who does not make a single return jointly with his spouse under section 6013 a tax determined in accordance with the following tables:

(1) **For taxable years beginning in 1982.—**

If taxable income is:	The tax is:
Not over $1,700	No tax.
Over $1,700 but not over $2,750 ...	12% of the excess over $1,700.
Over $2,750 but not over $3,800 ...	$126, plus 14% of the excess over $2,750.
Over $3,800 but not over $5,950 ...	$273, plus 16% of the excess over $3,800.
Over $5,950 but not over $8,000 ...	$617, plus 19% of the excess over $5,950.
Over $8,000 but not over $10,100 ..	$1,006, plus 22% of the excess over $8,000.
Over $10,100 but not over $12,300	$1,468, plus 25% of the excess over $10,100.

Over $12,300 but not over $14,950	$2,018, plus 29% of the excess over $12,300.
Over $14,950 but not over $17,600	$2,787, plus 33% of the excess over $14,950.
Over $17,600 but not over $22,900	$3,661, plus 39% of the excess over $17,600.
Over $22,900 but not over $30,000	$5,728, plus 44% of the excess over $22,900.
Over $30,000 but not over $42,800	$8,852, plus 49% of the excess over $30,000.
Over $42,800	$15,124, plus 50% of the excess over $42,800.

(2) For taxable years beginning in 1983.—

If taxable income is:	The tax is:
Not over $1,700	No tax.
Over $1,700 but not over $2,750 ...	11% of the excess over $1,700.
Over $2,750 but not over $3,800 ...	$115, plus 13% of the excess over $2,750.
Over $3,800 but not over $5,950 ...	$252, plus 15% of the excess over $3,800.
Over $5,950 but not over $8,000 ...	$574, plus 17% of the excess over $5,950.
Over $8,000 but not over $10,100 ..	$923, plus 19% of the excess over $8,000.
Over $10,100 but not over $12,300	$1,322, plus 23% of the excess over $10,100.
Over $12,300 but not over $14,950	$1,828, plus 26% of the excess over $12,300.
Over $14,950 but not over $17,600	$2,517, plus 30% of the excess over $14,950.
Over $17,600 but not over $22,900	$3,312, plus 35% of the excess over $17,600.
Over $22,900 but not over $30,000	$5,167, plus 40% of the excess over $22,900.
Over $30,000 but not over $42,800	$8,007, plus 44% of the excess over $30,000.
Over $42,800 but not over $54,700	$13,639, plus 48% of the excess over $42,800.
Over $54,700	$19,351, plus 50% of the excess over $54,700.

(3) For taxable years beginning after 1983.—

If taxable income is:	The tax is:
Not over $1,700	No tax.
Over $1,700 but not over $2,750 ...	11% of the excess over $1,700.
Over $2,750 but not over $3,800 ...	$115, plus 12% of the excess over $2,750.
Over $3,800 but not over $5,950 ...	$241, plus 14% of the excess over $3,800.
Over $5,950 but not over $8,000 ...	$542, plus 16% of the excess over $5,950.

Over $8,000 but not over $10,100 ..	$870, plus 18% of the excess over $8,000.
Over $10,100 but not over $12,300	$1,248, plus 22% of the excess over $10,100.
Over $12,300 but not over $14,950	$1,732, plus 25% of the excess over $12,300.
Over $14,950 but not over $17,600	$2,395, plus 28% of the excess over $14,950.
Over $17,600 but not over $22,900	$3,137, plus 33% of the excess over $17,600.
Over $22,900 but not over $30,000	$4,886, plus 38% of the excess over $22,900.
Over $30,000 but not over $42,800	$7,584, plus 42% of the excess over $30,000.
Over $42,800 but not over $54,700	$12,960, plus 45% of the excess over $42,800.
Over $54,700 but not over $81,200	$18,315, plus 49% of the excess over $54,700.
Over $81,200	$31,300, plus 50% of the excess over $81,200.

(e) Estates and trusts.—There is hereby imposed on the taxable income of every estate and trust taxable under this subsection a tax determined in accordance with the following tables:

(1) For taxable years beginning in 1982.—

If taxable income is:	The tax is:
Not over $1,050	12% of taxable income.
Over $1,050 but not over $2,100 ...	$126, plus 14% of the excess over $1,050.
Over $2,100 but not over $4,250 ...	$273, plus 16% of the excess over $2,100.
Over $4,250 but not over $6,300 ...	$617, plus 19% of the excess over $4,250.
Over $6,300 but not over $8,400 ...	$1,006, plus 22% of the excess over $6,300.
Over $8,400 but not over $10,600 ..	$1,468, plus 25% of the excess over $8,400.
Over $10,600 but not over $13,250	$2,018, plus 29% of the excess over $10,600.
Over $13,250 but not over $15,900	$2,787, plus 33% of the excess over $13,250.
Over $15,900 but not over $21,200	$3,661, plus 39% of the excess over $15,900.
Over $21,200 but not over $28,300	$5,728, plus 44% of the excess over $21,200.
Over $28,300 but not over $41,100	$8,852, plus 49% of the excess over $28,300.
Over $41,100	$15,124, plus 50% of the excess over $41,100.

(2) For taxable years beginning in 1983.—

If taxable income is:	The tax is:
Not over $1,050	11% of taxable income.
Over $1,050 but not over $2,100 ...	$115, plus 13% of the excess over $1,050.
Over $2,100 but not over $4,250 ...	$252, plus 15% of the excess over $2,100.
Over $4,250 but not over $6,300 ...	$574, plus 17% of the excess over $4,250.
Over $6,300 but not over $8,400 ...	$923, plus 19% of the excess over $6,300.
Over $8,400 but not over $10,600	$1,322, plus 23% of the excess over $8,400.
Over $10,600 but not over $13,250	$1,828, plus 26% of the excess over $10,600.
Over $13,250 but not over $15,900	$2,517, plus 30% of the excess over $13,250.
Over $15,900 but not over $21,200	$3,312, plus 35% of the excess over $15,900.
Over $21,200 but not over $28,300	$5,167, plus 40% of the excess over $21,200.
Over $28,300 but not over $41,100	$8,007, plus 44% of the excess over $28,300.
Over $41,100 but not over $53,000	$13,639, plus 48% of the excess over $41,100.
Over $53,000	$19,351, plus 50% of the excess over $53,000.

(3) For taxable years beginning after 1983.—

If taxable income is:	The tax is:
Not over $1,050	11% of taxable income.
Over $1,050 but not over $2,100 ...	$115, plus 12% of the excess over $1,050.
Over $2,100 but not over $4,250 ...	$241, plus 14% of the excess over $2,100.
Over $4,250 but not over $6,300 ...	$542, plus 16% of the excess over $4,250.
Over $6,300 but not over $8,400 ...	$870, plus 18% of the excess over $6,300.
Over $8,400 but not over $10,600 ..	$1,248, plus 22% of the excess over $8,400.
Over $10,600 but not over $13,250	$1,732, plus 25% of the excess over $10,600.
Over $13,250 but not over $15,900	$2,395, plus 28% of the excess over $13,250.
Over $15,900 but not over $21,200	$3,137, plus 33% of the excess over $15,900.
Over $21,200 but not over $28,300	$4,886, plus 38% of the excess over $21,200.
Over $28,300 but not over $41,100	$7,584, plus 42% of the excess over $28,300.

Over $41,100 but not over $53,000	$12,960, plus 45% of the excess over $41,100..
Over $53,000 but not over $79,500	$18,315, plus 49% of the excess over $53,000.
Over $79,500	$31,300, plus 50% of the excess over $79,500.

(f) Adjustments in tax tables so that inflation will not result in tax increases.—

(1) In general.—Not later than December 15 of 1984 and each subsequent calendar year, the Secretary shall prescribe tables which shall apply in lieu of the tables contained in paragraph (3) of subsections (a), (b), (c), (d), and (e) with respect to taxable years beginning in the succeeding calendar year.

(2) Method of prescribing tables.—The table which under paragraph (1) is to apply in lieu of the table contained in paragraph (3) of subsection (a), (b), (c), (d), or (e), as the case may be, with respect to taxable years beginning in any calendar year shall be prescribed—

(A) by increasing—

(i) the maximum dollar amount on which no tax is imposed under such table, and

(ii) the minimum and maximum dollar amounts for each rate bracket for which a tax is imposed under such table,

by the cost-of-living adjustment for such calendar year,

(B) by not changing the rate applicable to any rate bracket as adjusted under subparagraph (A)(ii), and

(C) by adjusting the amounts setting forth the tax to the extent necessary to reflect the adjustments in the rate brackets.

If any increase determined under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the nearest multiple of $10 (or if such increase is a multiple of $5, such increase shall be increased to the next highest multiple of $10).

(3) Cost-of-living adjustment.—For purposes of paragraph (2), the cost-of-living adjustment for any calendar year is the percentage (if any) by which—

(A) the CPI for the preceding calendar year, exceeds

(B) the CPI for the calendar year 1983.

(4) **CPI for any calendar year**—For purposes of paragraph (3), the CPI for any calendar year is the average of the Consumer Price Index as of the close of the 12-month period ending on September 30 of such calendar year.

(5) **Consumer Price Index**—For purposes of paragraph (4), the term "Consumer Price Index" means the last Consumer Price Index for all-urban consumers published by the Department of Labor.

26 U.S.C. § 6013(b)

(b) Joint return after filing separate return—

(1) **In general**—Except as provided in paragraph (2), if an individual has filed a separate return for a taxable year for which a joint return could have been made by him and his spouse under subsection (a) and the time prescribed by law for filing the return for such taxable year has expired, such individual and his spouse may nevertheless make a joint return for such taxable year. A joint return filed by the husband and wife under this subsection shall constitute the return of the husband and wife for such taxable year, and all payments, credits, refunds, or other repayments made or allowed with respect to the separate return of either spouse for such taxable year shall be taken into account in determining the extent to which the tax based upon the joint return has been paid. If a joint return is made under this subsection, any election (other than the election to file a separate return) made by either spouse in his separate return for such taxable year with respect to the treatment of any income, deduction, or credit of such spouse shall not be changed in the making of the joint return where such election would have been irrevocable if the joint return had not been made. If a joint return is made under this sub-section after the death of either spouse, such return with respect to the decedent can be made only by his executor or administrator.

(2) **Limitations for making of election**—The election provided for in paragraph (1) may not be made—

26 U.S.C. § 6013(b)

(A) Unless there is paid in full at or before the time of the filing of the joint return the amount shown as tax upon such joint return; or

(B) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or

(C) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213; or return was filed (but not earlier than the last date prescribed by law for filing the return of either spouse);

(ii) Where only one spouse filed a separate return prior to the making of the joint return, and the other spouse had less than $1,000 of gross income ($2,000 in case such spouse was 65 or over) for such taxable year—on the date of the filing of such separate return (but not earlier than the last date prescribed by law for the filing of such separate return); or

(iii) Where only one spouse filed a separate return prior to the making of the joint return, and the other spouse had gross income of $1,000 or more ($2,000 in case such spouse was 65 or over) for such taxable year—on the date of the filing of such joint return.

26 U.S.C. § 6653(a)

§ 6653. Failure to pay tax.

(a) Negligence or intentional disregard of rules and regulations with respect to income or gift taxes— If any part of any under-

payment (as defined in subsection (c) (1) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propery, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibitd by it to the States, are reserved to the States respectively, or to the people.